CHAPTER V.

THE LIMITATIONS TO WHICH RIGHTS OF USER ARE SUBJECT.

SECTION I.—THE PRINCIPLE THAT THE RIGHTS, NOT BEING RIGHTS OF OWNERSHIP, MUST BE EXERCISED WITHIN LIMITS, AND MAY BE REGULATED ACCORDINGLY.

§ 1.—*The principle stated.*

I HAVE said that the great bulk of our forests are constituted on lands in which the ownership vests in Government, but there are rights of user (servitudes) existing on it in favour of villages and individuals.

It is of the first importance, therefore, to understand the true nature of those rights of user, and how they may be dealt with, so as to secure their continued enjoyment without imperilling the maintenance of the forest which supports them.

This principle it is of great importance to understand clearly; misapprehension on the subject has led to much difficulty and a great deal of useless discussion in the matter of forest legislation.

The principle asserts, in effect, that all rights are in their very nature subject to a reasonable limitation and regulation in their exercise, without giving the right-holder any claim to compensation on that account.

This regulation must, of course, be within certain limits, so as not to destroy the right: in other words, the limitation must go no further than is necessary to enable the forest to be managed and worked in a rational manner. What is meant by a 'rational manner,' will be enquired into afterwards. Here I am concerned only with the principle itself.

I shall establish this, *first*, by a consideration of the nature of a right or servitude; *secondly*, by the authority of modern European

law and by the opinions of authors of repute; *thirdly*, I shall add some considerations derived from the history of the growth of forest rights in India, which will show that such a principle is here, more than ever reasonable and fair.

This last will be important, although it will to some extent repeat what I have said in another place. But the argument is necessary, because it meets the objection that principles established from European authorities, do not apply to India.

§ 2.—*The nature of a right of user.*

We have already learned that a forest right or servitude, whether held personally, or as "appendant to" (for the beneficial enjoyment of) some house or land, is a right existing in favour of one person over the property of another[1]. It in no sense constitutes a share in the property itself, or is synonymous with co-ownership in the property. It follows then, almost naturally, that rights cannot go to such an extent as to swallow up the property—to render it, even gradually, useless and valueless to the owner.

A certain obligation seems to lie on both sides. I must not use my property in such a way as to prevent your having a just and due enjoyment of your right: you cannot exercise your right in such a way as either to destroy my property or make it useless to me. This is perfectly true in the case of a right existing over a private forest or any other kind of private property, and it acquires additional cogency when the property is owned by Government, *i.e.*, when it exists for the public benefit; when it brings in revenue to the treasury, sends useful products to the market, and furnishes public works with needful material; while at the same time (in the case of forests) the property has such a place in the economy of nature, that its preservation is absolutely indispensable to the country at large.

Nor is such a principle really to the detriment of the right-holder in the long run; especially so when, not an individual right,

[1] I may again recall the definition of Act XV, 1877.

but a body of rights representing, perhaps, the requirements of many villages is in question.

The limitation of the right is, after all, a matter of economy and moderation; and the exercise of such prudence may—indeed must—tend to perpetuate the enjoyment of the right itself.

If all practices of grazing, lopping and the like, which form the subject of forest rights, go on without any restraint in a forest, unless the forest is very large in proportion to the demands on it, it is certain that the supply of material will gradually fall off; the ill-used trees will die, the soil will dry up, till there are no more boughs to cut and no more grass for the cattle to eat. Restriction of the rights then tends to maintain the estate, which, after all, is necessary for the very continuous existence of the right itself.

True it is that wasteful exercise of rights does not, in one man's life, ruin a forest estate; but it does in the course of years; and a forest administration is, of all others, the most bound to look to the future, and to take care that the present generation of inhabitants does not imperil the safety of future generations by attacking the capital, where they have only a right to use the yearly income[2].

§ 3.—*Consensus of authority on the subject: the Roman law.*

But, secondly, let me proceed to show that this principle of the inherent limitability of rights of user has a complete *consensus* of laws and authorities from the earliest times to the present day in its favour.

[2] Yet we not unfrequently have complaints made (in general terms and irrespective of precisely ascertained facts) of the cruelty of shutting up forests or putting them under restrictions, and the desirableness of leaving the forest to "free and unfettered enjoyment" of the people; although it is certain that, in the course of years,—more or less according to the moistness of the climate and rapidity of vegetation—these forests will degenerate, first into scrub, and ultimately into barren waste. Then the right-holders will be deprived of the very convenience it was desired to secure to them. Instances might be quoted where apparently barren and useless hill tracts have been kept under proper management, each portion being allowed rest in its turn, and so forth; and, after a few years only, have been the means of furnishing a reserve of grass, which has proved of the utmost value and saved the lives of hundreds of cattle in times of drought and famine.

To begin with the Roman law, which has largely affected succeeding systems.

The Roman lawyers spoke of the most extensive right of enjoyment of *another* man's property, which could be had consistently with the property itself still remaining to the owner, as the *usufructus*. The grantee of such a right could take the whole of the produce and do absolutely what he liked with it.

But even this extensive right had always so to be exercised as not to destroy the property itself. It had to be exercised *salvâ re substantiâ*[3]—the estate itself being untouched—and in the manner in which a good head of a family would enjoy the produce of an estate which was his own.

If this is true of the holders of such a right that the entire use and enjoyment of property was in the right-holder's hands, how much more must a limitation be valid in the case of a man who has a right to only a part of the products (to grazing, wood or such like); *à fortiori, he* must not injure the estate itself, or prevent its reasonable development and improvement.

Rights in a forest are always, if we look to their origin, rights of user. The whole, or nearly the whole, yield of the forest may be

[3] See Inst. Justinian, Lib. II, Tit. IV, 1; and Digest, vii, 9, 1.

I am aware that the phrase *salvâ rerum substantiâ* is not always understood in the sense I have given it. This is explained in Collet Sandars' "Justinian" (2nd edition), page 205. It is thought that the text may rather mean that the right of usufruct lasts *as long as the substance of the estate itself lasts, or is preserved.* This meaning, it is argued, agrees better with the context, which goes on to say that if the estate ceases to exist, the usufruct ceases also. However this may be, it is quite certain that the meaning I have given is *a* correct meaning; it is adopted by all the German writers, Schenk, Profr. Bluhme, Roth, &c., and it is obviously borne out by the general terms of the law, which required that the *substance* should never be *altered* (as forest land being turned into arable, or a field being built over), and that it should be used and the fruits enjoyed "as by a good paterfamilias," *i.e.*, with due and prudent care. "The Roman jurists," remarks Eding (page 67), "who, for the most part, are only concerned with rights of usufruct created by testament and granted only for one life, held firmly to the principle that the usufructuary cannot alter the character of the estate, even to the improvement of its yield: for example, Ulpian denies him the right to root up a warren or common woodland and plant fruit trees instead." This is surely *salvâ re substantiâ* in the sense above applied to it.

taken up in supplying the aggregate requirements of a number of rights, but that is quite a different thing from the right called *usufruct*[4].

Such a right of user might, of course, by the terms of the grant, or by the result of long prescriptive exercise, be claimable in a particular way, or consist of a right to a certain quantity of the produce; but in the absence of such express terms, it was always understood that the right of user was limited to what was sufficient for the daily use of the right-holder and his family only Here, therefore, no possibility of touching the estate itself, or permanently injuring, weakening or reducing its productive power, was contemplated.

§ 4.—*Modern authorities: German writers.*

Turning next to modern authorities, the German writers are particularly clear on the subject. The first passage I shall quote is somewhat long: but it expresses the whole argument so forcibly, and yet so justly, and in a manner so suitable to Indian circumstances, that I cannot curtail it.

"Exactly," says Dr. Pfeil[5], "on the same principle that the owner of any property is obliged to use the same in such a way as not to injure his neighbours or endanger the welfare of the whole community[6], must forest rights be exercised, within certain limits. The State, then, is entitled, without paying any compensation, to

[4] As a matter of fact, I have never heard of a case in any part of India in which Government had granted away the entire usufruct, that is, everything in the forest except the proprietary right. In another connection I have alluded to the opinion of Proudhon on this subject. That eminent jurist was not the least likely to undervalue the possible claims of right-holders against the forest-owner; but he says (Meaume, Vol. I, p. 250, § 192) that it can never be supposed that a grant of rights meant a concession of the entire products of a forest, for that would be almost as much as to alienate the estate altogether. It is always reasonable to suppose that the forest-owner intended to associate the right-holder with himself in the enjoyment of the forest and its produce.

[5] Pfeil, § 2, p. 4.

[6] The allusion is to the well-known legal maxim "*sic utere tuo, ut alienum non lædas*"—so use your own right as not to injure another man's.

reduce forest rights to such an extent, but to such an extent only, as the public welfare demands. Many,— indeed most—forest rights originated at a time when either little value was attached to the forest, or when such small demands were made on it, that it would always supply the produce, however little care was bestowed on its management. The slender population found wood for its wants in superabundance, and nature unaided readily replaced the small quantities of produce removed. The very few cattle that grazed over a vast extent of forest offered no material hindrance to the growth of the young trees; if dead leaves were removed for litter, it was in too small a quantity to do any perceptible damage. But soon all this was changed. When population increased, cattle multiplied, cultivation extended, and new industries were called into existence; and this resulted not only in diminishing the area under forest, but in taxing more severely the productive power of the area that remained. The pressure on a forest, which is used by all the inhabitants of a certain place or district, increases enormously when the population grows to three or four times its original figure. The forest is then called on to supply an amount of wood and other produce that would exceed its possible yield even under the most careful management. It is hence unreasonable that the rights of outsiders should be exercised to such an extent as to make the maintenance of the forest and the reproduction of the trees impossible.

"When the increased population require wood and grazing for their very existence, it is the duty of the governing power to remove all obstacles to the cultivation of the soil, so that these necessaries may be produced in adequate quantity. Just as the State is required to obviate everything that is opposed to the most effective employment of labour, so that every inhabitant of the country, who can and will work, may be able to support himself, so must it secure freedom to every owner of land to employ that land in the manner most advantageous to himself and to the commonwealth.

"Accordingly, every one who exercises a right in another's forest must submit, without any claim to compensation, to such reasonable limitation as will enable the forest to be maintained as such.

"The devastation of a forest should, indeed, be preventible by any owner of his own free right; how much more so when such devastation is detrimental to the interests of the State at large.

"In mountainous countries avalanches and landslips may be caused by such devastation. Soil may be washed away by the force of water running off denuded areas; the lower lying estates may be covered with detritus, and dangerous floods may be caused by the sudden rising of mountain torrents. In sandy districts, forest destruction may not only produce dangerous sand-drifts, but may cause deterioration, to an enormous extent, of the culturable soil in the vicinity. Springs dry up; the climate becomes more rigorous in winter, and hotter in summer; there is no protection against storms (and forest is often in this respect an indispensable protection to agriculture): in short, forests provide the most necessary requisites of life, so that without wood, even the most fruitful country (how much more so in an inhospitable climate) would become uninhabitable.

"On the same principle, even an absolute proprietor of a forest must submit, in the public interest, to have the utilisation of his forest circumscribed so far as is necessary to maintain its existence: and if this is so, *à fortiori*, the person who has only a right of user in the woods, can be treated in the same manner. For there are many rights which, exercised without restraint and to the greatest possible extent, would be so destructive that no forest could survive them. Where numerous herds of all kinds of cattle roam through the whole forest, no young trees can grow up, nor can the material cut out be ever replaced. Where the removal of *humus* or surface soil is so extensive that even places full of seedlings are cleared of dead leaves, pine-needles, &c., the ground will at last lose its power of nourishment, and especially if it is by nature poor, nothing more in the way of useful wood can be grown on it.

"When trees, however young, are tapped for resin, they can no longer be got to grow up into timber of useful size. Consequently, it is not only the right, but the duty of Government, to limit the exercise of forest rights to such an extent as the maintenance of the forest demands; and for this, as I have said, the right-holder has no claim to any compensation.

"This principle is undeniable and is admitted on all hands. Every civilised Government has made it applicable to the protection of its forests."

So Eding[7]: "Just as it is true on the one hand that the owner of the forest must so direct its management that the right-holder may always have a forest in existence wherein to exercise his right to it is true, on the other, that the right-holder has a corresponding obligation not to exercise his right in such a manner that the forest (which is the *perpetua causa* of his right) should be destroyed and the estate itself, in substance, injured[8]. He must, just as much as an usufructuary[9], exercise his right *salvâ re substantiâ;* that is, without injury to the permanent yield-capability of the forest (*nachhaltigen Ertragsfahigkeit*).

"You cannot naturally expect an individual right-holder to impose this restraint on himself, and against his own interest; the injury caused by excess may be such as does not become fully manifest in the lifetime of one man; to know how and when to restrain the exercise of a right, requires an amount of professional training, not to speak of foresight and self-denial, which it is impossible to expect to find in the right-holder himself.

"The law has therefore stepped in and secured the existence of the forest by prescribing the regulation of the exercise of rights.

"The limitations imposed by law are mainly directed to this object, namely, that the forest-owner may be able to work his forest by regular progressive cuttings, and to close a certain extent of the

[7] Eding, pp. 76, 77.

[8] See also the Prussian *Allgemeine Landrecht*, Tit. 22, Theil I, § 80.

[9] See page 104, *ante*, where I explained this.

area cut over, with a view to reproduction. In such areas the forest-owner may preclude the exercise of rights of user, until the trees have grown up to such a height that they are out of danger."

And Dr. Roth[10]: "A right to wood can only extend to the regular yield of a forest in its original or normal condition. To demand more would be to attack the capital or estate itself, and so contradict the essential idea of a 'servitude.' Rights to other produce must also be exercised within such limits that the 'substance'—the forest soil and growth—be not injured[1]."

§ 5.—*French authorities.*

The French authorities are no less clear. The Code (Article 65) lays it down distinctly that rights can only be exercised to the extent which the state of the forest and its normal yield-power justify. *L'exercis des droits pourra toujours être reduit par l'administration, suivant l'état et la possibilité des forêts*[2].

Grazing rights can only be exercised in parts of the forest declared "*defensable,*" that is, of such an age that the trees will not be injured (Code For., Art. 67).

[10] Roth, § 257, p. 263.

[1] The Saxon law requires that all such rights should be exercised "with the least loss to the proprietor" (*Burgerlicher Gesetzbuch*, § 524), and by the "Mandat" (concerning forest rights) of 1813, in the same kingdom (see Qvenzel, p. 201), rights are subject to "such limitations that the property is not destroyed." Grazing rights are limited as described above in the extract from Dr. Roth's work (Mandat, §§ 7-8). The Bavarian law is practically the same (Law of 1852, Art. 23). Dr. Roth, commenting on this law, says: "the existence of an *unlimited* right is inconceivable, for that would be to make the right-holder the same as a proprietor." The Austrian *Forstgesetz* has similar provisions (§§ 8-9: Grabner, p. 201, &c.) Nor are rights to be restricted, only to such an extent that the forest "*is barely kept alive*:" it must be so that the forest can be managed in a reasonable manner. See also, generally, on this subject, von Berg, p. 179, and authorities there quoted.

[2] *Possibilité* is the quantity of material which can be taken annually from the forest consistently with maintaining it in a healthy condition of permanently sustained yielding-power. Nor was this a novelty in the Code. An old Ordonnance of A.D. 1376 (Meaume, § 271) had nearly the same provision, which is repeated in laws of the 15th and 16th centuries, and in the celebrated Ordonnance of 1669 (although Proudhon, contrary to all the later jurists, attempted to give a different sense to the term "possibilité).

M. Dalloz[3] says the same thing: "Consequently, forest rights can only be demanded within reasonable limits, such as a proprietor himself must submit to, when managing his estate as a good '*paterfamilias.*' No right-holder can ask the proprietor to let him have material in ruinous quantities which would compromise the future of the forest. And hence the law lays down (Article 65 above quoted) that the exercise of rights must be according to the state and normal yield-power of the forest.

"These are the limits of the obligation of the proprietor, as the personal wants of the right-holder are the limits of his right."

The author goes on to quote with approbation a passage from the famous jurist Merlin (Répertoire V, Pâturage, § 1, No. 17), who says: "It has been admitted by the legislation of centuries that such restrictions shall be placed upon rights of user in forests, granted in general terms (or at a time when the value of land was not appreciated as it since has been) as the conservation of these important public and private properties requires."

Meaume[4] has taken this principle for granted, and contents himself with showing its antiquity, and arguing that the limit is the state of the forest and its yield-power (*possibilité*), as judged of professionally.

§ 6.—*Italian authorities.*

The Italian law of 1877 (Article 29) declares that no right in the forest subject to forest law, can exceed the limits of a right of user as defined in the Italian Civil Code; and that is, that the right can only extend to the actual personal wants of the right-holder and his family[5]; and in Article 34 it concludes by saying that where rights are exercised in the forest, they are to be subject to "regulation."

[3] Répertoire de Législation, Vol. 25 (Paris, 1849), Article "Forêts" (Cap. 15, Sec. 1, No. 1403).

[4] § 271 *et seq.*

[5] Codice-Civ., § 521.

§ 7.—*English authorities.*

The English law, as might be expected, does not furnish us with authorities quite so distinct, because there are no large areas of natural forest, and questions of the kind now under consideration rarely or never arise. Nevertheless, there is enough to show that the principle is recognised. Thus Cooke[6], speaking of grazing rights, says: "Rules for the protection *and limitation* of the right are among the earliest provisions of the Common Law;" and again: "It is contrary to the very essence of a right to turn out such an unlimited number of cattle by which the whole of the herbage might be consumed * * * * Such a user the law considers not as a right, but a wrong." "You could no more," the author goes on to say, "acquire by prescription such an unlimited right, than you could acquire a right to clip the Queen's coin[7].

§ 8.—*The principle rendered applicable by the circumstances of Indian forest rights.*

It remains only to dispose, much more briefly, of the third position I proposed to take up, *viz.*, that the history of the growth of forest rights in India offers no reason why such a principle should be regarded as inapplicable, but that the contrary rather is true.

I have already remarked that, in India, forest rights are nearly always "prescriptive," or have grown up by long customary exercise. It is only in some cases that orders at a land revenue settlement, or specific grants or "parwánas" from Government, have declared, conceded or originated, rights of user in a forest.

The majority of these rights grew up at a time when the "waste" was abundant, and the Government of the day did not care to interfere with its use.

[6] Cooke, p. 4.

[7] Cooke, p. 25. Williams does not expressly mention the subject, but he quotes several cases which show that claims to indefinitely extensive rights of common are bad at law.

Whether under the circumstances, even a majority of such rights rest on a really legal basis of prescription—that is to say, whether a title has been acquired strictly within the meaning of section 26 of the Limitation Act, 1877—may fairly be doubted[8].

If that is the case, then the reasonable limitation by Government of practices which may be, after all, in the eye of the law only licenses, would hardly require to be argued for or supported in detail at all[9].

I do not, however, wish to raise any such questions, nor is it desirable that what are practically and equitably rights should be subjected to any process of subtle argumentation. I prefer what has been (and no doubt will always be) the practice of Forest Settlement Officers, to treat all really long-established customary practices, in themselves reasonable and required for the well-being of the villages and individuals in the neighbourhood of the forest, as *virtually rights;* and I would have them limited where it is just and necessary, not on any supposition that they are only licenses, but as

[8] It is not too much to say that if forest rights in India had to be established as rights of common have in England, two-thirds of them would not stand the test.

You have always to show that either you and your ancestors, or you, as the holder of a certain estate, and those who preceded you in that estate, have the right. A *custom* alleging all *the inhabitants of a place* had a right of grazing, was held bad (Williams, page 13), because there was an indefinite and fluctuating body, not that each person had a right as an ancestral one, or was attached to an estate which he held. Custom may be pleaded to establish a particular *incident*, to show what a right extended to; and copyholders can plead custom for a right in the manor of which they are tenants; but this is an exception (Williams, p. 194).

[9] In a paper read before the Forest Conference in 1873, I endeavoured to classify forest 'rights' into (1) strict rights and (2) privileges, urging that the latter are of course always limitable at the will and pleasure of the Government. I now think, however, that the natural, legal and equitable limitation which is inherent in all rights as exercised over another's property, is quite sufficient in all cases; and that the legislature has done wisely in saying nothing of privileges, which in fact have no place in law at all, and treating the whole question as practically one of rights. I may here remark that the term "privilege" is much used in this sense, in India, but that it now must be abandoned. If a standard dictionary be referred to it will be seen that 'privilege' properly means a *right* of the strictest sort. The term now properly used (see Act V of 1882 for example) is 'license.'

rights limitable on the basis of an equitable, civilised, law of rights[10].

I only wish the origin and history of rights in India to be borne in mind, lest any one should urge that, however authoritative the principles I have established in European law, it ought not to be applied in India.

It is not questionable, as I have elsewhere fully shown, that the unoccupied waste in India always belonged to the governing power. But for centuries that waste remained largely in excess of the cultivated area, and the people from the villages wandered into it at their will and took what they wanted from it, no one preventing them. But the moment the governing power desired to make a grant of the waste to be brought under cultivation, the land was given as an unencumbered grant, and the exercise of grazing, &c., simply had to cease[1]. No one would have dreamt of such a thing as compensation for the stoppage of the practices of grazing and wood-cutting. Those that had cattle simply moved on to the next jungle; wood-cutters removed to the next hill-side: that was all. In the same way, whenever the monarch wanted a "shikárgáh," or hunting preserve, or a place for his stud to graze in, he at once took the land and prohibited any interference with it, and often punished with barbarous severity any attempt to trespass or infringe his prohibition. Nor did the ruling power hesitate to issue orders, which were really orders for the conservation of the forest in so far as the intelligence of the day understood it. These orders generally extended to declaring teak, sandalwood, or blackwood (or whatever it was) to be "royal trees," not to be touched by any one; and in many provinces these orders have been made use of in forest conservancy to this day.

[10] Of course there may be in India, just as in Europe, real "licenses," (*concession* of French law) not in any sense rights, and dependent solely on the pleasure of Government; but these have nothing whatever to do with rights or with forest settlement.

[1] See this admitted, though not so directly stated, in the Kanara Judgment (p. 222). It is, however, quite beyond question.

The State was therefore in the position, not of one who granted rights or who suffered them to grow up adversely, but of one who knowing that he can interfere at any moment, simply does not care to do so.

It is the result of Western Government, and the security it brought, that population has increased and cultivation extended. The waste, once so extensive that thousands of cattle might roam over it without doing harm, and any amount of wood be cut, gradually became so restricted that it is only in the great hill ranges, and in certain districts which can be enumerated in a single breath, that anything like the primeval jungles and forests of former days now remain. In not a few districts there is no forest at all, and in very many, actual pressure has been felt as regards the area for forest grazing and the supply of wood.

When it began to be realised in India that *forests had a necessary place in the natural organisation of the provinces*, and that wherever forests still existed of any valuable extent or kind, they should of necessity be preserved; when, too, our last settlements began to determine what waste belonged to the villages and what to Government, then for the first time the idea of a *right* to graze or to cut wood, which was antagonistic to the desire to demarcate and preserve the forest, came to notice.

As I said before, I am not arguing—far from it—that it was not perfectly just and proper to admit these ancient and necessary usages to the position of "rights," and to give them the designation they were best entitled to. It was impossible to secure by law the rights of all classes without adopting the terms and to some extent the definitions of Western law. And just as we have conceded a "proprietary right" in land, some may concede a "prescriptive right" to forest produce. But admitting the propriety of the term "rights," I must contend that the origin of such rights should not be forgotten, and this certainly makes it more than ever reasonable that Western principles regarding the true nature and the necessary limits of such rights should be applied, as well as the legal name and its beneficial consequences. If there was nothing to prevent a Ráj-

put Chief, a Mughal Emperor, or an Amír of Sindh, from absolutely closing large areas of forest for the selfish purposes of sport, how much more reasonably can it be urged that the present Government has a right—for the public welfare and for future safety—to insist on the conservation of its forests, and for that purpose to regulate the rights of user in them, to what is necessary for the safety and permanence of the forest.

§ 9.—*Some consequences of the principle.*

It follows naturally, that if a right can only be so exercised that the property is not injured, there *can be no such thing* as a *right to do a wantonly destructive act*, or to a usage exercised in a manner destructive to the forest soil and growth[2].

No person, for instance, could conceivably have a *right* to go about a sál forest, killing outright stem after stem for the sake of a small cup of resin, worth perhaps an anna or two—if so much. If there was a right at all, it would be only to extract resin in some way not inconsistent with the proper maintenance of the trees.

Some rights are in India habitually exercised in a destructive way. Some who have perhaps a real right of grazing, insist that, for its proper exercise, it is necessary to set fire to the old grass clumps, so that new and tender grass may spring up. Where this is done in a forest, so that trees or brushwood (that are of any value as part of the estate) are injured, it is clear that Government has a perfect right, while allowing the grazing, to put a stop to its exercise in this destructive manner.

Nor is it of any force to argue, that popular opinion (and even that of some persons who ought to know better) maintains that forests are not injured by fire passing through. If it is a question what is injurious to a forest and what is not so, it is necessarily professional opinion—as competent as can be had—that must be taken, and not the opinion of ignorant and unlettered persons, or what is held as the "popular idea" on the subject.

[2] It has been expressly decided in England that there cannot be a prescriptive right to do an unlawful thing (Attorney General *v.* Mathias. See Williams, p. 177).